IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 606 of 1994

with

MISC. CRIMINAL APPLICATION NO. 3805 OF 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHATURBHAI DHULABHAI VAGHRI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 606 of 1994
   MR KR RAVAL for Petitioner
   MR KG SHETH ADDL. PUBLIC PROSECUTOR for Respondent
2. Misc. Criminal Application No. 3805 of 1995
   MR KG SHETH ADDL. PUBLIC PROSECUTOR for Petitioner
   MR KR RAVAL for Respondent (Amicus Curiae)

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 09/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE SHARAD D.DAVE for the Court)

1. The appellant/original accused of Sessions Case no. 287 of 1992 has filed the present appeal against the judgment and order of the learned Addl. Sessions Judge, Nadiad dated 17.3.1994 by which the appellant has been convicted under Sec. 376 of the Indian Penal Code and sentenced to Rigorous imprisonment for seven years and fine of Rs.3,000/- in default to undergo rigorous imprisonment for five months. While admitting the appeal filed by the accused, the Division Bench of this Court (Coram : K.J.Vaidya and M.H.Kadri, JJ) issued notice for enhancement of sentence by order dated 11.10.1995, which is numbered as Misc. Criminal Application no. 3805 of 1995.

2. The prosecution case is that the complainant/victim Sumiben was brought up by her maternal uncle as her mother expired when she was two years old. Prior to three months of the date of the complaint, her father/accused Chaturbhai Dhulabhai Salat-Vaghri came to her maternal uncle's place and requested them to send her with him as there was nobody in his house to do the household work. On his request, her maternal uncle and aunt agreed to send her with him and her father stayed there. On the next day her father took her to their home at village Danteli which is in Petlad taluka of Kheda District. Her paternal aunt Jadiben who was residing previously with her husband, near their house shifted to some other place as their house had fallen and due to this the house of the complainant became secluded. Her paternal uncle Somabhai Dhulabhai was staying at some distance while her other paternal uncle Babubhai, though married had quarrelled with his wife and was staying in their house. The complainant used to serve food to her father daily even though he came late at night. When the first incident occurred, her uncle Babu had gone to Khanpur and there was nobody in the house except the complainant and the accused. The accused came around midnight in a drunk state and raped the complainant by gagging her mouth with a piece of cloth. After that he asked her to take oath and that she will not tell about the incident to anyone. She, therefore, did not tell anything to anybody about the rape. On the next day, in the afternoon, the accused repeated the same conduct with her then again at about 11 p.m., the accused repeated the act with her. At that time while the accused was putting on his clothes, the complainant's uncle Somabhai entered to take a match stick to light his bidi and on understanding the situation, asked the accused as to why

he was doing such a thing to his own daughter. On this there was some argument between the accused and his brother. Thereafter, on the next day the complainant's uncle went to Petlad and did not return till night and the accused committed rape on her even during that night. On the next day, the complainant ran away from the house of the accused and went to her paternal aunt's place at village Kanisa, where she narrated the incident to her aunt and though the accused came there to take her back frequently, she did not go with him. On this, the accused told the husband of his sister not to tell the incident to anybody and that he shall fix some match for the complainant so that she can get married. But even after one month, the accused did not turn up. Thereafter, the complainant went with her aunt Shantaben and lodged the FIR exh. 17 on 1.10.93.

3. The charge against the accused was framed by the trial court on 19.1.1994 for the offence punishable under Sec. 376 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried.

4. On appreciation of the oral and documentary evidence adduced by the prosecution, the learned Judge found that it was proved by the prosecution that the accused had committed rape on his daughter Sumiben and convicted the accused under Sec. 376 of the Indian Penal Code sentencing him to seven years' rigorous imprisonment and a fine of Rs.3,000/- in default to undergo rigorous imprisonment for five months.

5. Sumiben was examined by Dr.Indrakant Rajvadiya p.w.1 on 1.10.93. In his deposition exh. 7, the medical expert has stated that he examined the victim Sumiben who was brought with police yadi and found the following.

- She was conscious and her blood pressure was 120/72.
- During the examination, the victim mentioned that she is one and half months pregnant.
- She does not have any sensation of vomiting.
- Her menstrual cycle was regular.
- Her last menstrual cycle was not regular.
- During examination, it was found that hair on her breast, armpit and private part were developed. Her womb was also developed. Her voice was also changed.

During the internal examination, he found the following :

- There was old injury on her hymen.
- Two fingers easily passed p/v.

- Her blood group was B RH+
- Her womb was well developed in size. Her voice was also changed.

On Laboratory examination, no spermatoza found

5.1. In the opinion of the doctor, there were no signs of a recent sexual intercourse. For determining the age, the doctor examined her x-rays of right wrist, right elbow and pelvis. He found that developing part of humerus and radials were not joined by episusion and diaphysis to radius and ulna and further iliac crest was also not joined. Thus, the doctor ascertained her age to be of 15 years old. The oral version of the medical expert is supported by the certificate issued by him which is on record at exh. 9. After examining the victim, the doctor referred her to the S.S.General Hospital, Baroda for pregnancy test.

5.2. Dr. Chandraprakash Gor p.w. 4 examined the victim in the S.S.General Hospital, Baroda. He has stated in his deposition exh. 19 that the victim was not pregnant. He gave his certificate at exh. 21 which shows that she was not pregnant.

6. Dr. Dattatray Radhakishan Khadayte p.w.2 examined the accused while he was serving as a Medical Officer at S.S.Hospital, Petlad. He has stated in his deposition exh. 11 that present accused Chaturbhai Vaghri was brought before him on 4.10.1993 with a police yadi and on his examination, he found him to be normal and observed that there was no finding which would suggest that he is not capable of performing sexual intercourse.

7. The victim Sumiben in her deposition exh. 16 has categorically deposed about the repeated rape committed by her father-the accused on her and is fully corroborated by her complaint exh. 17. She has, in clear terms, stated that the accused came to her maternal uncle's place at Vadodara, where she was staying after the death of her mother, and requested them to send her with him as there was no body to prepare food at his house. Thereupon, she came to village Dantali. As per her say, her paternal aunt who was in the neighborhood had shifted her residence since her house had fallen down. Thereafter, the prosecutrix narrated the incident step by step from which it is crystal clear that rape was committed repeatedly by the accused upon his daughter Sumiben who was 15 years of age.

8. The learned counsel for the appellant/original accused submitted that the complainant was not telling the truth because if he had committed the indecent act as stated by her repeatedly, she should have shouted and run away from the house. The motive behind the false complaint, according to the learned counsel, could have been the money which the parents of the girl would get on her marriage. The paternal aunt and uncle of the girl wanted the money and therefore they maliciously instigated the complainant to file a false complaint against her father, so that they can get her married and get the amount. As per the learned counsel, there was no reason for the complainant to file such a complaint after a lapse of one month and if really the incident had occurred, she would have filed the complaint immediately or atleast would have told her nearest relative about the indecent act committed by her father. According to the learned counsel, the conduct of the prosecutrix itself shows that she has falsely implicated her father.

9. While arguing the enhancement appeal of the State, the learned counsel submitted that the accused has already undergone sentence of seven years and five months as he could not deposit the fine imposed upon him. His precious period of life has gone in jail and hence this court should not interfere with the order passed by the learned trial judge and should drop the notice for enhancement issued by this court.

10. The learned A.P.P. on the other hand submitted that in this case, the father who should have been the protector of his daughter has committed rape on her and thereby committed a heinous crime. There was no reason for the complainant to falsely implicate her own father. The medical evidence shows that she was only 15 years old at the time of the offence. There is also oral as well as documentary evidence supporting this point. Therefore, the fact that the prosecutrix had described herself of the age of 20 years, would not go against the prosecution. Under the circumstances, the learned A.P.P. submitted that to set an example in the society, maximum punishment of 10 years and fine should be imposed on the accused.

11. The evidence on record clearly establishes beyond any shadow of doubt that the prosecutrix was repeatedly raped by her own father. Since her own protector had ravished her, as a child she could not be expected to behave in a manner that a stranger would. A girl of 15 years of age with no female member in the house cannot be expected to raise shouts and gather people to witness her father's misdeeds. It is only when she could make up her

mind to run away and went to her aunt's house that she could muster up the courage. In the peculiar facts of the case where rape was committed by her own father this minor prosecutrix could not be disbelieved merely due to the delay in lodging the FIR. She had to gain nothing and would stand to lose on all counts by making such complaint against her own father which would bring shame to her family and retard her marital prospects. We find that her version, which is also borne out in the FIR exh. 17, though does not need any independent corroboration is in fact corroborated by the deposition exh. 24 of Shantaben who is the sister of the accused. She has stated that the accused was married about 15 or 16 years back and Sumi was born. Her mother died shortly thereafter. This shows Sumi was even less than 15 years of age. Witness Arvindbhai the maternal uncle of Sumi has in his deposition exh. 25, denied the suggestion that Sumi was 20 years of age and has maintained that she was only 15 years old.

12. We are of the opinion that minor contradictions or omissions in the version of Sumi are due to her illiteracy and also due to a long gap between the incident and her deposition and are of no consequence. The medical examination of the victim was done after a month of the incident and therefore no direct evidence of rape can be expected from the medical examination of Sumi. We are satisfied from the evidence on record that there was no question of Sumi having given consent for sexual intercourse with her father, apart from the fact that the question of consent was wholly irrelevant since she was only 15 years of age. The accused has acted shamelessly and committed this abominable crime.

13. We may aptly refer to the decision of the Supreme Court in State of Himachal Pradesh V/S Gian Chand reported in 2001 AIR SCW 1903, in which the Supreme Court has reproduced in para 16 of its judgment the following observations from its decision in State of Punjab V/S Gurmit Singh reported in AIR 1996 SC 1393 :

> "A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature,

to throw out an otherwise reliable prosecution case."

13.1. In State of Maharashtra V/S Chandraprakash Kewalchand Jain reported in AIR 1990 S.C.658, the Supreme Court has held that "the prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of a crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Sec. 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice."

14. On going through the evidence on record, we find ourselves in complete agreement with the reasoning and findings of the learned trial Judge who has rightly convicted the accused for the offence under Sec. 376 of the Indian Penal Code.

15. Though this case merits sentence of 10 years rigorous imprisonment because it is an abhorrent case of a father raping his own daughter, since much time has elapsed and the accused has already undergone the sentence, we drop the suo motu notice for enhancement which was issued earlier by the court and dispose of the Misc. Criminal Application no. 3805 of 1995 accordingly, while confirming the conviction and sentence imposed on the accused. The appeal is dismissed.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

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